United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1290

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RUSSEL KELNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered on July 9, 1975, on a one-count indictment charging Russel Kelner with having caused a communication containing a threat to be transmitted in interstate commerce in violation of 18 U.S.C. §875(c). The defendant was found guilty after a trial by jury presided over by the Hon. Richard Owen. The sentence was a suspended one-year term of imprisonment,

four years' probation, and a committed fine of $1,000. This case has not previously been before this Court and there are no related cases pending here.

QUESTIONS PRESENTED

1. Whether the defendant "caused" the transmission of a communication in interstate commerce within the meaning of 18 U.S.C. §875(c) by being interviewed by a television newsman who subsequently, with full knowledge of the contents of the interview, had the interview broadcast on an evening news program.

2. Whether a television broadcast to the general viewing audience is a "communication" within the meaning of 18 U.S.C. §875(c).

3. Whether a "threat" made by a defendant in New York directed at individuals known to be in New York constituted the transmission of a communication in interstate commerce because it was broadcast by a television station and, accordingly, seen and heard outside the State of New York by some people who were not parties to the dispute.

4. Whether the defendant's communication contained a "threat" within the meaning of 18 U.S.C. §875(c) if it was said in the context of a public announcement on a subject of overriding public concern at the time and was not accompanied by any other action to do physical harm or any intent to commit an injury.

5. Whether the trial court erred in permitting the prosecution to cross-examine defendant's reputation witnesses about arrests of the defendant that occurred after the commission of the alleged offense.

STATUTE INVOLVED

18 U.S.C. §875(c) provides as follows:

(c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

This is an appeal from a conviction on a one-count indictment charging Russel Kelner with violating 18 U.S.C. §875(c) by transmitting and causing to be transmitted in interstate commerce a communication containing

a threat to assassinate Yasir Arafat, the leader of the Palestine Liberation Organization, while Arafat was in New York City on November 11, 1974. Mr. Kelner was found guilty by a jury after a three-day trial before the Hon. Richard Owen. Judge Owen imposed a suspended prison term of one year, four years' probation, and a $1,000 committed fine.

1. Background

The objective facts were not in serious dispute. On November 11, 1974 Yasir Arafat came to New York to attend a session of the United Nations General Assembly which he had been invited to address. Arafat's presence and the circumstances of his invitation aroused enormous passion among Jews in the United States, and particularly in New York. The news media understood that Arafat, along with the entire "delegation" of the Palestine Liberation Organization, were staying at the Waldorf-Astoria Hotel in New York City (Tr. 72-74, 109).[1/] Prior to Arafat's

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1/ "Tr." refers to pages of the trial transcript, which is reproduced in full in the Appendix. The indictment, judgment and notice of appeal appear in a Supplemental Appendix.

arrival, demonstrations were held by Jewish groups, including the Jewish Defense League, in the neighborhood of the United Nations (Tr. 246), and on November 11 (at about 6:00 p.m.) the Jewish Defense League, among others, held a demonstration at the Waldorf-Astoria (Tr. 70-72, 270-273).

2. A News Conference Is Called

Sometime after 5:30 p.m. on November 11, the United Press International Wire Service received the following "advisory" which was sent out to its subscribers at 6:00 p.m. (Tr. 54-62, 243):

> The Jewish Defense League holds news conference to allege threats have been made against JDL by Palestine Liberation Organization, 1133 Broadway at 26th Street, Room 1026, 8:00 p.m.

John Miller, a reporter for WPIX, which broadcasts on Channel 11 in the New York City area, was assigned to attend the press conference. He arrived at the Jewish Defense League headquarters at about 8:00 p.m. with a cameraman, a sound man, and a lightman (Tr. 75-79). Representatives of other news media were there, and Miller entered after the conference had begun (Tr. 84-85).

3. The Appellant

Mr. Kelner is a 34-year-old college graduate and former high school teacher in the Philadelphia school system (Tr. 232-233). He accepted a job with the Jewish Defense League in 1973, because he felt "a strong organization was necessitated . . . for supporting the survival and the existence of the State of Israel" (Tr. 233). On November 11, 1974, he was office manager (or "operations officer") of the Jewish Defense League at its headquarters in New York City (Tr. 234).

4. Various Reporters Ask Questions

Mr. Kelner conducted the news conference on November 11. He testified that the conference began with a discussion of the threats received by the Jewish Defense League from the Palestine Liberation Organization -- the subject described on the UPI advisory (Tr. 249-250). Each of the reporters were asking Mr. Kelner separate questions, and he was "prancing" from one to another "trying to satisfy all of them." He testified that "midway" in the conference, "the questions started to deal with Yasir Arafat himself, and by the nature of the questions coming from the reporters it was very obvious that they wanted an outrageous or sensational response from JDL as to in

what way JDL would deal with Yasir Arafat" (Tr. 253).

5. The WPIX Film

Miller of WPIX was one of the reporters, and he conducted an interview with Mr. Kelner that was filmed by the WPIX cameraman. The interview began about fifteen minutes after Miller arrived. The WPIX cameraman was stationed approximately six feet from Mr. Kelner, and Miller, who was standing two or three feet from Mr. Kelner, held a microphone with the number "11" attached to it (Tr. 86-87). Miller testified that while he was setting up his cameras, he overheard one of the radio reporters who was interviewing Mr. Kelner ask him what he meant by "get," and that the reply then had to do with "the assassination plot in relation to Mr. Arafat" (Tr. 104).

The film taken by Miller and his crew contained the following exchange:

Kelner:	We have people who have been trained and who are out now and who intend to make sure that Arafat and his [illegible]eutenants do not leave this country alive.
Miller:	How do you plan to do that? You're going to kill him?
Kelner:	I'm talking about justice. I'm talking about equal rights under the law, a law that may not exist, but should exist.

Miller: Are you saying that you plan to kill them?

Kelner: We are planning to assassinate Mr. Arafat. Just as if any other mur-- just the way any other murderer is treated.

Miller: Do you have the people picked out for this? Have you planned it out? Have you started this operation?

Kelner: Everything is planned in detail.

Miller: Do you think it will come off?

Kelner: It's going to come off.

Miller: Can you elaborate on where or when or how you plan to take care of this?

Kelner: If I elaborate it might be a problem in bringing it off.

6. Props and Effects

Mr. Kelner testified that he had placed a gun on the desk in front of him before the news conference began, but that it could not be fired and was not loaded (Tr. 279). He explained that the gun was there "for the entire psychological effect, of the picture that would

be shown in the newspapers." He said he "wanted to create an appearance of Jews who are angry, who are tired of seeing children murdered, of bloodshed in Olympic competitions and apartment houses" (Tr. 280). He also testified that he "was not thinking of the PLO at that time. We were thinking of the Yasir Arafat in town and I didn't expect him to watch any television or read any newspaper. I was not communicating with him at all" (Tr. 283).

7. Why?

Mr. Kelner testified as follows regarding the press conference and film (Tr. 266-267):

> What we were trying to convey in the press conference was merely what we had told the press upon calling them to our offices as was indicated in the United Press International wire that we felt that we had to respond to the threats that we had received from alleged memorandums of the PLO by telephone, a matter which was under investigation by the New York Police Department.
>
> This is a matter of record. We felt that we had to tell the public that we were ready as Jews who were not going to be pushed around by any terrorist organization that kills wilfully and indiscriminately and that we would defend ourselves and protect ourselves and that they would not be able to accomplish anything in accordance with their threats.

As we outlined yesterday, the press conference proceeded beyond that because the reporters were looking for more than such information and they resumed questioning seeking whether we would take some action against Yasir Arafat.

He also testified regarding the purpose of his remarks (Tr. 258-260, 267):

Q: What did you want to demonstrate by your remarks?

A: Merely outrage, nothing else, and merely the fact that there are Jews who no longer sit back and are led like lambs to the oven.

Q: What would you do?

A: I don't understand the question.

Q: What would you do other than what you said? Did you have any such intention to do anything?

A: At that particular moment none at all.

Q: Did you have intentions the day before?

A: None at all except to conduct demonstrations on the streets as we had been doing.

* * * * *

Q: You weren't referring to a threat of violence, were you?

A: Referring to it?

Q: Yes, in the statement that was there, did you threaten?

A: As I said before, the words were the words of a threat, but at that particular time there was no followup being planned at all.

* * * * *

Q: Were you going to take any action against Yasir Arafat?

A: No, we were not.

Q: Was there any intention on your part?

A: None at all.

8. WPIX Decides To Show The Film

The WPIX film of the interview with Mr. Kelner was given by Miller to a cabdriver who took it to the WPIX office on 42nd Street (Tr. 83). At the WPIX offices, a decision was made by the News Department to show the film on the Ten O'Clock News, and it was shown at that time (Tr. 50-51). Mr. Kelner was not involved in any way in the decision to show the film (Tr. 51). The broadcast range of WPIX extends to 50 miles from the Empire State Building, thereby taking in portions of New Jersey and Connecticut (Tr. 31).

9. Kelner Is Arrested

The FBI arranged "augmented special coverage" during Arafat's visit (Tr. 152). One agent, Vincent Milaccio, was assigned to a 4-to-12 midnight shift, during which he was to act as liaison with the Police Department and Secret Service (Tr. 154). Milaccio received a telephone call from the Police Department at about 9:30 p.m., advising him that a press conference had been held at the JDL offices, and he watched the Ten O'Clock News as a consequence of that call (Tr. 156). After watching the newscast, Milaccio called the Police Department and the Secret Service. He then spoke with an Assistant United States Attorney, who asked him to obtain "the verbatim remarks of Mr. Kelner" (Tr. 156-157).

Early in the afternoon of the following day, Milaccio obtained the transcript. After he provided it to the Assistant United States Attorney, between 2:00 and

3:00 p.m., Mr. Kelner was arrested and charged with a violation of 18 U.S.C. § 875(c) (Tr. 171-174). Milaccio testified that, to his knowledge, the only added security precautions taken after Mr. Kelner's statement was broadcast over WPIX was that the Police Department "instituted a surveillance" on Mr. Kelner (Tr. 168).

10. Trial

The indictment was filed on February 27, 1975. Before trial, defense counsel moved to dismiss the indictment on constitutional grounds, asserting, inter alia, that First Amendment rights are infringed by this application of Section 875(c) (App. A3-A6). The motion was denied.

The prosecution's evidence consisted of testimony identifying the WPIX film and the UPI "advisory," and the testimony of Miller and Milaccio. The film was shown to the jury. At the conclusion of the prosecution's case, defense counsel moved for a judgment of acquittal on the ground that the interstate transmission of the alleged "threat" had been done by an independent agent -- those at WPIX who decided to show the film on television (Tr. 181). Defense counsel observed that both Mr. Kelner

and Yasir Arafat were in New York, and this made the interstate broadcast "irrelevent" (Tr. 185). Judge Owen denied the motion for judgment of acquittal.

The defense case consisted of the testimony of four character witnesses and Mr. Kelner. The prosecutor cross-examined two of the character witnesses by asking whether they had heard of arrests of Mr. Kelner in connection with protest demonstrations -- three arrests occurring after the alleged offense (Tr. 196-197, 227). The prosecutor also asked about an alleged assault on an Egyptian diplomat in December 1973 (Tr. 196, 226). Defense counsel objected on each occasion.

The case went to the jury under instructions that the "threat" need not be shown to have been actually communicated to the addressee (Tr. 409), and that Mr. Kelner could be guilty of "causing" the threat to be transmitted in interstate commerce if he took some action "without which the communication in interstate commerce would not have occurred" and if he intended, knew or could reasonably have foreseen that there would be a transmission in interstate commerce (Tr. 416). The jury was instructed that "mere political hyperbole or expression of opinion

or discussion does not constitute a threat" (Tr. 410), but the definition of "threat" given to the jury was "an expression of an intention to inflict either injury or damage on another" (Tr. 409). After two hours of deliberation, during which it asked to have Section 875(c) read to it (Tr. 431), the jury returned a verdict of guilty.

In a post-trial motion filed under Rule 29(c), the defense contended (1) that Section 875(c) does not apply to television broadcasts, (2) that WPIX was an "independent intervening force" responsible for the interstate transmission, (3) that there was no "threat" because there was no evidence that Mr. Kelner's statement was ever communicated to Yasir Arafat, (4) that Mr. Kelner's statement was protected speech within the reach of the First Amendment, and (5) that the cross-examination of character witnesses was improper (App. A8-A16). Judge Owen denied the motion and imposed sentence.

ARGUMENT

Introduction

The federal statute under which Russel Kelner stands convicted required proof of

(1) a transmission

(2) in interstate commerce

(3) of a communication

(4) containing a threat to injure the person of another.

Mr. Kelner was found guilty on a record that establishes

(1) no "transmission" on his part;

(2) the presence of himself and Yasir Arafat -- the target of the alleged "threat" -- within the same state;

(3) the absence of any effort by him to "communicate" with Arafat; and

(4) statements which, in full context, were not "threats" but only public declarations of revulsion and fierce opposition.

We discuss below the precise reasons why the conduct of Mr. Kelner was not covered by Section 875(c), even granting the prosecution the benefit of all inferences and the most favorable view of its proof. But before turn-

ing to each of these points individually, we emphasize how far removed the public display of outrage by Mr. Kelner was from the kind of conduct which Congress was seeking to prohibit when it enacted the predecessor to Section 875 (c) in 1939. In 1934, Congress first enacted a law which was the original of subsections (a) and (b) of Section 875, designed "to punish the transmission in interstate commerce by any means whatsoever of extortion demands accompanied by threats of injury, violence or kidnaping." H.R. Rep. No. 1456, 73d Cong., 2d Sess. 1 (1934). The 1934 law supplemented earlier legislation which prohibited use of the mails for such threats and demands; it was designed "to prohibit the interstate transportation of such messages by any means whatsoever." Ibid.; see 48 Stat. 781.

In 1939 the law was broadened because, said the then Attorney General, there had been situations where "the element of intent to extort money or other thing of value [was] absent in cases involving the sending of threats through the mails or in interstate commerce, although the threat may be of a dangerous or vicious character." H.R. Rep. No. 102, 76th Cong., 1st Sess. 2 (1939). The illustration cited was a threat "directed to the Governor of a Southern State

threatening that if certain defendants in a criminal case were not released the home of the Governor would be blown up." Id. at 3. The 1939 law, as enacted, defined "interstate commerce" to "include communication from one State, Territory or the District of Columbia to another State, Territory or the District of Columbia."

Plainly what Congress had in mind in enacting the law was a situation in which the defendant directed his threat, across State lines, to an addressee whom he was intending to injure, irrespective whether the motive was pecuniary gain or some other objective. Could Congress have intended to cover a case where the actual "transmission" of the threat was knowingly made by someone else, where both the speaker and the subject of the "threat" were in the same State, where the statement was made to the world at large and not to any particular addressee, and where the "threat" consisted, in substance, of an ethnic and nationalistic declaration rather than a true statement of intent to inflict bodily harm?

I

MR. KELNER NEITHER TRANSMITTED NOR CAUSED THE TRANSMISSION OF THE ALLEGED "THREAT"

Our first argument is not unique to Section 875(c), and it does not depend on an analysis of the precise statutory language. It is, rather, based on a long-standing and fundamental rule stated as follows in Terry v. United States, 131 F.2d 40,44 (8th Cir. 1942):

> [I]t is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may be converted into a crime at a subsequent time by the independent action of other persons.

The court in Terry relied on the leading decision in United States v. Fox, 95 U.S. 670, 671 (1878), where the Supreme Court had before it a federal law prohibiting the obtaining of goods on credit, with intent to defraud, if, within three months, the person obtaining the goods became the subject of bankruptcy proceedings begun "either upon his own petition or that of a creditor." The Supreme Court ruled that it was impermissible to turn conduct into an offense against the United States "upon the happening of a subsequent event, not perhaps in the contemplation

of the party and which may be brought about, against his will, by the agency of another." Ibid. See also United States v. Dietrich, 126 Fed. 676, 685 (C.C.D. Neb. 1904) (Van Devanter, J.); Perkins, Criminal Law 836 (1969).

Shortly after 9:00 p.m. on November 11, 1974, Russel Kelner had completed everything that, according to the prosecution, constituted his criminal conduct. Yet no violation of Section 875 (c) had then occurred. By 9:30 p.m., according to the prosecutor's proof, the New York City Police Department knew enough about what had occurred at the press conference to call the FBI and alert Agent Milaccio to watch the Ten O'Clock News. Apparently, the FBI and the New York Police knew that a federal offense would take place sometime after 10:00 p.m. because of acts that other individuals, not acting in concert with Mr. Kelner, would be performing after his actions were entirely completed.

Employees of WPIX -- fully cognizant of what their film contained[2] -- determined to broadcast the film within the 50-mile radius covered by the station. The federal statute, if carefully read, does not punish the utterer of a threat

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[2]/Miller testified twice that he was involved in the editing process before the film was shown (Tr. 89, 105-106). He knew what had occurred at the news conference and he saw the film again before it was shown. If anyone was directly responsible for sending a threat on the airwaves, it was Miller.

or, indeed, the person who intends to commit a physical injury pursuant to a threat. It punishes the transmitter, and it is altogether clear that the only individuals who deliberately engaged in transmission in interstate commerce were the WPIX employees who knowingly put on the air the statements that Mr. Kelner had made to Miller at 1133 Broadway sometime before 9:00 p.m.

Judge Owen misunderstood 18 U.S.C. §2 in the instructions he gave the jury when he stated that a defendant has "caused" an act to be done by another if the defendant's own conduct satisfies the "but for" or sine qua non test and if he could have "reasonably foreseen" or "intended" action by someone else. "Causing" an offense, like aiding and abetting, requires a closer association between the alleged accessory and the person who commits the initial act. One is not an aider-and-abettor or "causer" of a homicide if one leaves a murder weapon (such as a knife) on a table where a responsible adult can pick it up and stab the victim -- even if one "intended, knew or could reasonably have foreseen that the murderer would do what he did and the murderer would have had no other weapon if the knife were not there. So long as the murderer is

not acting by prearrangement, or otherwise in concert, with the person who places the knife, his independent volitional act cannot be charged to that person.

Mr. Kelner participated between 8:00 and 9:00 p.m. in placing on a celluloid film and on a soundtrack the alleged "implements" with which the offense described in Section 875(c) could be committed. Employees of WPIX -- not acting upon his instruction or urging, or in furtherance of his objectives -- then used those implements to commit the offense. The factual situation here is comparable to what might be presented under Section 876 ("Mailing threatening communications") if a defendant were to write out a threatening letter and leave the open letter in a public place. If someone else, not acting at the defendant's behest, were then to pass by, read the letter, decide to send it in the mail to the addressee, place it in an envelope, affix a stamp and deposit it in a mailbox, could the defendant be charged and convicted of the offense of mailing a threatening communication simply because the letter would not have been sent if he had not written it and a jury could find that he could "reasonably foresee" or "intend" that an unassociated third person would decide to mail it?

Section 2(b) of the Criminal Code, which declares that one is guilty as a principal if he "causes an act to be done which, if directly performed by him, would be an offense against the United States, "is simply inapplicable to these facts. It has consistently been held that "[i]n the context of this provision, 'cause' means 'a principal acting through an agent or one who procures or brings about the commission of a crime.'" United States v. Levine, 457 F.2d 1186, 1188 (10th Cir. 1972), quoting from United States v. Inciso, 292 F.2d 374, 378 (7th Cir.), cert. denied, 368 U.S. 920 (1961). It is undisputed that the personnel at WPIX were not Mr. Kelner's agents, nor did he "procure" their interstate transmission of his interview.

In every real sense, the decision of the WPIX employees was an "independent intervening cause" of the federal offense of transmission in interstate commerce. The facts here present a criminal-law conundrum usually of interest principally to law professors -- Whose act was the proximate cause of the offense? Classic homicide cases produce the answer:

(1) State v. Angelina, 73 W.Va. 146, 149, 80 S.E. 141, 142 (1913): "[I]f after a mortal blow or wound

is inflicted by one person another independent responsible agent in no way connected in causal relation with the first, intervenes and wrongfully inflicts another injury, the proximate cause of the homicide, the latter and not the former is guilty of the murder."

(2) State v. Hambright, 111 N.C. 707, 714, 16 S.E. 411 (1892): "It is true that if one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, the first cannot be said to have killed."

(3) People v. Lewis, 124 Cal. 551, 555, 57 Pac. 470, 472 (1899): "[I]f the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of homicide. . . ."

At best, Mr. Kelner's interview with Miller "afforded an opportunity" for the WPIX employees to commit the federal offense. Hence Mr. Kelner cannot be guilty of that crime.

II

THERE WAS NO "COMMUNICATION" WITHIN THE MEANING OF SECTION 875(c) BECAUSE THERE WAS NO SPECIFIC ADDRESSEE OF MR. KELNER'S ALLEGED "THREAT"

The language of Section 875(c) is carefully drafted. It does not cover the transmission in interstate commerce of any threat, but only reaches the transmission of a "communication containing any threat." We have found no decided case focusing on the word "communication," but we believe that, in light of Congress' original purpose in 1934 and 1939, it limits the reach of Section 875(c) to instances where there is a specific addressee whom the transmitter of the interstate message is intending to reach and on whom he intends to inflict pain or cause emotional suffering.

A comparison of Section 875 (all subsections of which refer to "communications containing" certain kinds of threats or demands) with Section 871, the statute relating to threats against the President and Vice-President, tells the story. Whereas the latter defines the offender broadly as a person who "makes any . . . threat" against a public

official (which would include threats pronounced to no particular addressee),[3] Section 875 only reaches one who utters words which qualify as "any communication containing" a threat. The three words "any communication containing" could have been omitted if Congress intended a broad sweep for the statute.

The history of the 1934 legislation supports this limited reading. As originally drafted, the bill would have prohibited the transmission "in interstate commerce by telephone, telegraph, radio, or oral message, or by any other means whatsoever, any threat . . . ." Before enactment, the House Committee dropped the references to"message" and to specific forms of communication, and left the statute to read "shall transmit in interstate commerce, by any means whatsoever, any threat . . . ." H.R. Rep. No. 1456, 73d Cong., 2d Sess. 1 (1934). At this time, however, the law was limited (as we have previously noted, pp. 17-18, supra) to transmissions made with intent to extort -- which can only be

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3/ For this reason, the conduct in Watts v. United States, 394 U.S. 705 (1969), a statement made to a discussion group during a public rally, amounted to a violation of Section 871.

accomplished if there is a definite and known addressee of the communication. It was clear, in any event, that the evil Congress was trying to reach was the use of interstate facilities for the transmission of a "message" from one person to another person or entity, not their use to broadcast a statement to the world at large.

In 1939, when the law was expanded to include threats that were not extortionate in nature, Congress reinserted the words that limited it to "messages" sent in interstate commerce. The word "communication" in the present law is, we submit, the equivalent of "message" in the original version of the 1934 act. It means that the law is violated only if the transmitter of the threat (or its utterer) has a specific addressee in mind, and the threat is directed to such an addressee.

To be sure, there are decisions that indicate that the addressee need not be the anticipated victim of the physical injury. E.g., United States v. LeVison, 418 F.2d 624 (9th Cir. 1969); United States v. Holder, 302 F. Supp. 296, 299 (D. Mont. 1969), aff'd 427 F.2d 715 (9th Cir. 1970); cf. United States v. Pignatelli, 125

F.2d 643 (2d Cir.), cert. denied, 316 U.S. 680 (1942). But in every case we have found, the "threat" was communicated to a specific addressee who, in the mind of the defendant, was in a position either to act upon the threat or to communicate it to someone who could act upon it or be placed in fear.

This is the first case we have found of a prosecution under either Sections 875 or 876 where the alleged "threat" was broadcast to an indefinite and unknown audience. Mr. Kelner testified, without contradiction that he was not expecting Yasir Arafat to watch the WPIX Ten O'Clock News, and there was no evidence whatever of the "threat" actually reaching Arafat. In this context, we submit, there was no "communication" or "message" within the meaning of Section 875 (c).

Finally, we note in this regard that neither the 1934 or 1939 Congress really had broadcasting in mind. Radio was referred to in an original draft of the 1934 law only as a means of communicating messages from one person to another, and television was, of course, not even available. The criminal law enacted in 1934 and 1939, even if subject to a literal construction that would reach television broadcasting, should not be construed to cover it. cf. McBoyle v. United States, 283 U.S. 25 (1931).

III

THERE WAS NO COMMUNICATION "IN INTERSTATE COMMERCE" WITHIN THE MEANING OF SECTION 875(c)

The legislative history of the 1932 and 1939 acts indicates that Congress was concerned with actual "interstate transportation" of threats and demands. In other words, it wanted to prohibit threats that were communicated across State lines, not threats that were entirely intrastate. To achieve this objective, the statute was geared, in its original version in 1934, to a transmission "in interstate commerce." And "interstate commerce," in turn, was explicitly defined to "include communication from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia."

In drafting this law Congress did not, as it has done with other statutes, make the offense depend on whether a "facility in interstate or foreign commerce" was used. Compare 18 U.S.C. §1952. Rather, Congress has insisted that the communication itself be "in interstate commerce." This means that the defendant must be in State A and the intended recipient of his "threat" must be in State B. All the cases we have found under Section

875(c) have involved such communications across State lines.

In the present case, it is undisputed that both Mr. Kelner and "Arafat and his lieutenants" -- the targets of the "threat" -- were in New York City. Indeed, they were just a few blocks apart on the evening of November 11. If, therefore, the "communication" of which Mr. Kelner is accused is the statement that "Arafat and his lieutenants [will] . . . not leave this country alive," that communication did not have to cross State lines to travel from Mr. Kelner to "Arafat and his lieutenants."

The fact that the WPIX broadcast communicated the message beyond where it had to be communicated to be a "threat," and that this greater range carried across State lines, does not bring the conduct within Section 875(c). It was not necessary, for "communication" of the "threat," for it to be seen and heard by viewers in Connecticut and New Jersey. Their viewing of it was, therefore, no part of the offense and cannot be said to bring the statement itself within "interstate commerce."

If, for example, a threat were uttered by one individual to another while both were in a television studio engaged in a live broadcast, the fact that the threat

was also carried, incidentally, over the television frequencies into neighboring States would surely not make it a communication in interstate commerce within the meaning of Section 875(c). The delivery of the oral message from the speaker to the intended addressee would require no broadcast whatever, and it would stretch the language of the statute far beyond Congress' purpose to permit it to be applied to such facts. The transmission of the WPIX Ten O'Clock News into New Jersey and Connecticut, to unknown and unknowable viewers in those States, is similarly irrelevant to this charge.

A broad application of Section 875(c) to Mr. Kelner's conduct here would extend the statute, through its "interstate commerce" component, to various kinds of uttered threats that might, only incidentally, travel across State lines. Such an expansion of a federal criminal statute in an area traditionally reserved to local law enforcement is contrary to principles applied by the Supreme Court in Rewis v. United States, 401 U.S. 808 (1971), and United States v. Bass, 404 U.S. 336 (1971). It is also contrary to the more limited interpretations

recently given by the Court to jurisdictional "interstate commerce" requirements in other regulatory statutes. See United States v. American Building Maintenance Industries, 95 S.Ct. 2150 (1975); Gulf Oil Corp. v. Copp Paving Co., 95 S.Ct. 392 (1974).

IV

THE STATEMENTS MADE BY MR. KELNER WERE NOT "THREATS" BECAUSE HE HAD NO INTENTION OF ACTUALLY USING FORCE AND BECAUSE THEY WERE ONLY "POLITICAL HYPERBOLE"

We turn now to the aspect of Section 875(c) that presents the most serious constitutional issue. We believe that irrespective of how the Court treats the gaps we see in the proof of other elements of the offense, the conviction of Mr. Kelner is not sustainable because his statements to the WPIX reporter, in context, were within the constitutional protection of the First Amendment. To be sure, if the statements had risen to the level of a clear and present danger to some legitimate governmental interest, they could be subject to prosecution. But we submit that the dissenting opinion of Judge Wright in Watts v. United States, 402 F.2d 676, 686 (D.C. Cir. 1968), rev'd, 394 U.S. 705 (1969), which the Supreme Court

appeared to approve (394 U.S. at 708), controls here and requires (1) evidence of specific intent on the defendant's part to carry out the threat and (2) a statement that "unambiguously" constituted a threat on the life of Arafat and his lieutenants.[4/] To save Section 875 from constitutional invalidity as applied to facts such as those shown here, these elements must be read into the statutory term "threat."

There are here three circumstances that are unique to this case and that distinguish it from every other reported prosecution under 18 U.S.C. §§875 and 876. First, unlike the "fighting words" in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), the statement here was very much an "essential part of [an] . . . exposition of ideas," and, unlike the statements in Cantwell v. Connecticut, 310 U.S. 296, 310 (1940), it was "communication of information or opinion." This cannot be said of the usual personal threat of physical injury that was proved in every other reported conviction under this statute. The full colloquy between Miller and Mr. Kelner expressed Mr. Kelner's strong view, shared by many of Americans of all faiths and particularly by American Jews, that "justice" and "equal rights" demanded that Arafat be treated as a murderer and be killed for the many deliberate

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4/ The Supreme Court granted certiorari in Rogers v. United States, 419 U.S. 824 (1974), on this issue, but never reached it because the Solicitor General confessed error on another point. 95 S.Ct. 2091 (1975).

deaths which he had caused. See pp. 7-8, supra. Mr. Kelner's "threat" to assassinate Arafat articulated a wish harbored by countless law-abiding citizens who had no public forum, who would feel inhibited in expressing similar hopes, but who nonetheless thought that a wanton murderer such as Arafat deserved to be a victim of the kinds of crimes he had inflicted on innocent civilians and women and children. This may be an "unpleasantly sharp" form of speech, but it was, in this context, part of "uninhibited, robust, and wide-open" discussion of a critical international public issue. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). In no event, certainly, could it be deemed any less communicative than the three-word message which the Supreme Court found to be constitutionally protected "public discussion" in Cohen v. California, 403 U.S. 15 (1971).

Second, unlike the other cases under Sections 875 and 876, the "threat" here was broadcast to the general public. Obviously a communication addressed to only a single listener -- possibly even to one who is offended by it -- is less deserving of constitutional protection under the First Amendment than a statement that is made to the public at large, and which seeks, in effect, to persuade

that public, through the "free trade in ideas" (Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) and through "the power of reason as applied through public discussion" (Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

Third, as the undisputed evidence shows, the "threat" made in this case was not a prearranged, carefully plotted communication. It resulted from substantial give and take between a large body of reporters and a single individual who was subjected to a barrage of questions. In considering whether the statement Mr. Kelner made was the kind of declaration that raised a clear and present danger or whether it was merely political extravagance, the circumstances that led up to it are certainly relevant.

In light of these factors, we believe that the district court erred in even submitting to the jury the question whether Mr. Kelner's statement was "political hyperbole." Would someone who presents a real and present danger announce in a television interview that he is intending to commit criminal violations? Or was Mr. Kelner doing what the defendant did in Watts v. United States, 394 U.S. 705, 708 (1969) -- engaging in "a kind of very

crude offensive method of stating a political opposition" to an international figure who has purposefully stirred controversy and who has aroused strong feelings among many Americans?

At the very least, the two prerequisites proposed by Judge Wright, dissenting in the Court of Appeals in the Watts case, should be applied here. On the undisputed proof, there was no specific intent, indeed no intent whatever, on Mr. Kelner's part to carry out the "threat" (See pp. 9-11, supra.). And it appears that the FBI and the Secret Service did not take the threat too seriously since they did nothing more than impose surveillance on Mr. Kelner. No proof was introduced of a single overt act directed at doing physical harm to Yasir Arafat and his lieutenants. And the prosecutor, in summation, argued that the question for the jury was not whether Mr. Kelner intended to carry out his threat, but whether he intended to have his words convey a threatening meaning (Tr. 355).

Nor was the threat "unambiguous." If the colloquy is examined, it is clear that Mr. Kelner never categorically answered Miller's question, "You're going to kill him?" Instead, he spoke about "justice," "equal rights," and "law." And when the question was repeated, he replied that Arafat should be assassinated "the way any other murderer

is treated." In the context of the discussion of law and justice, this could be taken to refer to a judicial proceeding, as was used to provide justice in the case of Adolf Eichmann. And the answers to the last three questions are entirely equivocal.

We submit that in the full context of the television interview, the notoriety regarding Arafat's visit, the massive protests, and all other surrounding circumstances, this Court should reverse the conviction and direct the entry of a judgment of acquittal because the statements made by Mr. Kelner did not constitute a "threat" encompassed by Section 875(c).

V

THE PROSECUTION'S CROSS-EXAMINATION OF REPUTATION WITNESSES WAS IMPROPER

The arguments we have heretofore made relate to whether any offense of the kind prohibited by Section 875(c) was committed. If the Court agrees with us on any of the first four points in this brief, the proper remedy is reversal with instructions to enter a judgment of acquittal or dismissal of the indictment. Even if, however, these arguments were rejected, there was one fundamental, highly

prejudicial error committed by the prosecution during the defense case that plainly requires a new trial.

The first four defense witnesses were called to testify to Mr. Kelner's reputation in the community. Under Michelson v. United States, 335 U.S. 469 (1948), this line of testimony opened the door to prosecution questioning of the witnesses as to whether they had heard of Mr. Kelner's being arrested on various charges growing out of Soviet Jewry protests and demonstrations. The prosecutor, however, went too far. He asked the first reputation witness the following questions about three arrests (Tr. 196-198):

> Q: Have you heard that since the time of the incident involved in this case and on January 19, 1975 in front of the Russian Embassy at Third and 67th Street the defendant was arrested by the New York City Police for disorderly conduct?
>
> MR. DECHTER: Objection, your Honor. That is not a crime at all. The United States Attorney has now come way past the point, it is not even a violation and I think the U.S. Attorney is now at this point being inflammatory. I respectfully ask the Court that when there is a question here that we are talking about the man's reputation or honesty or peacefulness, we are talking certainly that we don't require a defense for Mr. Kelner, yet at the same time we must be discussing it, I think the Court well knows, and it is a question, of course,

of law, but the jury is listening and I feel it is very, very unfair and it is a violation of the Fifth and Fourteenth Amendment and due process for my client.

THE COURT: Overruled.

A: I don't remember the question.

MR. DECHTER: A violation, your Honor. He said disorderly conduct. Am I wrong? A violation is not a crime, your Honor.

THE COURT: Overruled.

Read back the question.

(Question read.)

A: As I think I said before, I do know that he was picked up by the police in some kind of a demonstration. I don't know whether it was in New York or in Philadelphia.

Q: Have you heard, sir, that on February 10, 1975 the defendant was arrested by the New York City Police at New York City's Temple Emanuel on Fifth Avenue on charges of criminal trespass after refusing to leave the synagogue?

A: No, sir.

MR. DECHTER: Objection. I respectfully state that most of these cases, if not all, these charges were never even filed, your Honor; that the U.S. Attorney well knows that what he is doing at this point is reading from some kind of a report that is either inaccurate or that he is doing this with full knowledge and I certainly respectfully ask this Court that these questions are not

germane. There were no charges filed and at this point every one of these questions should be disallowed.

THE COURT: Overruled.

A: No, sir.

Q: Have you heard that on March 6, 1975 the defendant was arrested by the New York City Police at the United States Mission to the United Nations and charged with criminal trespass, malicious mischief and resisting arrest?

A: I don't think so, sir.

The alleged offense was committed on November 11, 1974. All three arrests that were the subjects of the above line of questioning occurred <u>after</u> the act with which Mr. Kelner was charged. One of these later arrests was also the subject of inquiry on cross-examination of the fourth of the reputation witnesses (Tr. 227):

Q: Have you heard that he was arrested by the New York City Police on February 10, 1975 at Temple Emanuel on charges of criminal trespass after refusing to leave the synagogue?

A: I was aware of that. That is not crimes within the reputation I testified to.

Q: Did you hear about that in the community?

A: Not with respect to Mr. Kelner. I am aware of that as a member of the JDL and not within the community itself. The community does not regard that as crimes.

The hornbook rule is as follows (McCormick, Evidence 456, 459 (1972), emphasis added):

> It is character at the time of the alleged crime that bears most nearly on the inference of innocence or guilt, and the reputation evidence must be confined to reputation at that time or a reasonable time before . . . . This is the power of the state to produce witnesses in rebuttal who will swear to his bad reputation, limited of course to the trait or traits opened by the defendant and to the period before the offense and not too remote.

The same rule is stated as follows in 29 Am. Jur. 2d, p. 398 (Evidence §348) (1967):

> Generally speaking, it is the reputation up to the time of the act in question which is admissible, and evidence of one's reputation subsequently thereto is not admissible.

Following this principle, there have been a substantial number of cases in State courts where criminal convictions were reversed because prosecutors asked reputation or character witnesses about an arrest or other charge against the defendant that had occurred after the alleged offense. See, e.g., State v. Williams, 16 N.J. Super. 372, 84 A.2d 756 (1951); Wharton v. State, 157 Tex. Crim. 326, 248 S.W. 2d 739 (1952), and cases cited from nine other jurisdictions in Annot., 47 A.L.R.2d 1258, 1301 (1956).

The questions in this case were particularly prejudicial. Notwithstanding counsel's explanations and Mr. Kelner's own testimony regarding them, they must have given the jury the impression that he was a regular and consistent lawbreaker. Accordingly, the jury would then have improperly assumed that his protestation of innocent intent with regard to this offense was untruthful.

The arrest at Temple Emanuel, about which the prosecutor questioned two of the witnesses, was particularly prejudicial. It gave the impression that Mr. Kelner was fighting his own people -- that Jews had had him arrested for illegal activity. In fact, it was so harmful from the defendant's point of view that he felt compelled to explain it, over two pages of transcript, during his own testimony (Tr. 240-242).

Objection was duly made to the questions as they were asked of the first witness, and the objection plainly did not have to be repeated when the question was asked again. To be sure, the objection did not focus on the time of the arrests, but the district court was put on notice of the defendant's position.

The evidence was thus erroneously admitted, and, during this short trial, it was very harmful. At the very least, Mr. Kelner is entitled to a trial free of such irrelevant and prejudicial factors.

CONCLUSION

For the forgoing reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served this 19th day of September, 1975, by first-class mail, postage prepaid, two copies of the Brief for Appellant on Don D. Buchwald, Esq., Assistant United States Attorney, United States District Court for the Southern District of New York, One Saint Andrews Plaza, New York, New York 10007.

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